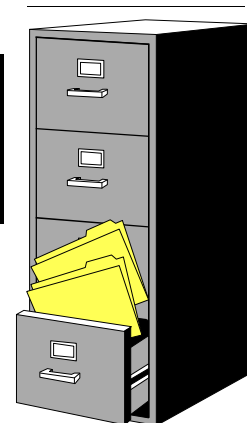


# Use of the Consent Calendar and Retention of Records in Cases Involving Juvenile Traffic Offenses



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## 1.1 Introduction

When a juvenile is cited for a criminal traffic offense, the Family Division of Circuit Court (hereinafter the “juvenile court”) may utilize one of four procedural avenues to handle the case. These procedural avenues are “diversion” from court proceedings, use of the “consent calendar,” use of a special “traffic docket,” and use of the “formal” court calendar. For serious traffic offenses (such as “drunk driving” offenses) and repeat offenders, courts typically place the case on the “formal calendar” and treat the case as they would any other delinquency case. Many less serious offenses committed by first-time offenders are initially handled by utilizing “diversion” or placing the case on the “consent calendar.”

“Consent calendar” and “diversion” procedures vary among Michigan courts. The “consent calendar” is a procedural mechanism contained in a court rule that allows the juvenile and the parent to consent to the jurisdiction of the “juvenile court.” If the juvenile, the juvenile’s parent, and

the court all agree to use the “consent calendar,” a disposition is imposed, but the juvenile may not be removed from the custody of his or her parent. The court must create a case file, but, if the juvenile was found responsible for a criminal traffic offense, it is unclear whether the court is required to permanently maintain this file. When required by the Michigan Vehicle Code, an abstract of the court record must also be sent to the Secretary of State so that an accurate “driving record” for the juvenile may be maintained.

Because of variations in “consent calendar” procedure among courts, some courts may not retain their own records of offenses or send abstracts of the court record to the Secretary of State. For example, courts may require an admission of responsibility for the offense but adjourn the proceedings prior to adjudication pending the juvenile’s successful completion of “probation” conditions. Other courts utilize “diversion” procedures for cases placed on the “consent docket.” When a case is diverted from court proceedings, the court does not establish jurisdiction over the juvenile; therefore, in most cases, the court is not required to send abstracts of the court record to the Secretary of State, and any court record may only be retained for a limited period of time.

This monograph outlines the required procedures for use of the “consent calendar” and describes how variations in “consent calendar” procedures affect record creation and retention requirements. Sample court policies and forms are provided to illustrate different approaches to the “consent calendar” utilized by Michigan courts.

## 1.2 Procedural Avenues for Juvenile Traffic Cases

The Family Division of Circuit Court has jurisdiction of criminal offenses committed by persons under 17 years of age, including criminal traffic violations. MCL 712A.2(a)(1); MSA 27.3178(598.2)(a)(1), and MCR 5.903(B)(4). A “crime” is an act or omission forbidden by law which is not designated as a civil infraction, and which is punishable upon conviction by imprisonment and/or a penal fine. MCL 750.5; MSA 28.195. See MCL 750.7–750.9; MSA 28.197–28.199 (definitions of felony and misdemeanor). Criminal traffic violations appear in both the Michigan Vehicle Code, MCL 257.1 et seq.; MSA 9.1801 et seq., and the Penal Code, MCL 750.1 et seq.; MSA 28.191 et seq.

When a juvenile is charged with a criminal traffic violation, the court may utilize one of four procedural avenues to process the case depending upon the severity of the offense, the juvenile’s background and behavior, and other factors that the court wishes to consider. The possible procedural avenues are:

- F The formal calendar.** If the case is placed on the formal calendar, it is treated as any other delinquency case. The court will conduct a formal adjudicative hearing and, if the juvenile is found responsible for the offense, a dispositional hearing.

- F **The informal “traffic docket.”** Under MCL 712A.2b; MSA 27.3178(598.2b), if a violation of the Michigan Vehicle Code is alleged, the court may hold an informal hearing. If the court finds that the allegation is true, it may impose a disposition. A court may utilize consent calendar or diversion procedures in cases treated on its “traffic docket.”\*
- F **Consent calendar.** The required procedures for use of the consent calendar are explained in Sections 1.3–1.4, below.
- F **Diversion.** The police officer or court may divert the juvenile from court altogether. If a referral accompanies the diversion, the juvenile may be required to comply with the terms of a diversion agreement. If the juvenile fails to comply with the agreement, the court may authorize a petition formally charging the juvenile with the offense. The required procedures are summarized in Section 1.5, below.

The determination of which procedure to use in a given case is typically made by the court’s “intake referee.”

### 1.3 MCR 5.932(B): the Consent Calendar

The term “consent calendar” is not defined in MCR 5.903, the court rule which contains the definitions applicable to juvenile proceedings. It is a procedural mechanism provided by court rule that allows for informal treatment of appropriate cases. If the court, juvenile, and the juvenile’s parent agree to place the case on the court’s consent calendar, the juvenile waives certain rights, including:

- F notice of charges, of the right to an attorney (at public expense, if applicable), of the right to a hearing before a judge, and of the right to jury trial;
- F the right to be advised of the privilege against self-incrimination; and
- F proof of “guilt” beyond a reasonable doubt.

In proceedings on the consent calendar, the court is limited in the dispositions it may order: the court may not remove the juvenile from the custody of his or her parents.

MCR 5.932(B) provides the rules governing the consent calendar. That rule states:

“(B) **Consent Calendar.** If it appears that protective and supportive action by the court will serve the best interests of the juvenile and the public, the court may, on authorizing the filing of a petition or on receipt of a citation or appearance ticket, and with consent of the juvenile and parent, proceed informally to hear the matter on the consent calendar in the manner provided in this subrule.

“(1) **Notice.** Formal notice is not required.

\*See Sections 1.12(A)–(C) for examples of court policies and forms used by courts to handle cases—including traffic cases—placed on the consent calendar.

\*See Section 1.8, below, for discussion of these reporting or “abstracting” requirements.

“(2) **Limited Disposition.** If, after hearing, the court finds the accusation is true, it may dispose of the matter pursuant to MCL 712A.18; MSA 27.3178(598.18), except that the juvenile shall not be removed from the custody of the parent. If, after hearing, the court finds that the juvenile has violated the Michigan Vehicle Code, MCL 257.1 *et seq.*; MSA 9.1801 *et seq.*, the court must fulfill the reporting requirements imposed by MCL 712A.2b(d), 257.732; MSA 27.3178(598.2b)(d), 9.2432.\*

“(3) **Transfer to Formal Calendar.** Failure to appear or violation of conditions of a disposition under subrule (B)(2) may result in transfer of the case from the consent calendar to the formal calendar on the charges contained in the authorized petition. Upon transfer, the court shall inform the juvenile of the rights, when applicable, as set forth in MCR 5.935(B)(4). Statements made by the juvenile during the informal proceeding pursuant to this subrule may not be used against the juvenile at a trial on the formal calendar based upon the same charge.”

\*See Section 1.6, below, for a detailed discussion of this issue.

Placement of the case on the consent calendar is appropriate “[i]f it appears that *protective and supportive action* by the court will serve the best interests of the juvenile and the public.” MCR 5.932(B) (emphasis added). A court policy of expungement or destruction of court records upon the juvenile’s successful completion of “consent probation” is consistent with taking “protective action” with regard to the juvenile. For example, such a policy would protect the juvenile from suffering certain disabilities because of a court record arising from a single isolated incident. See *People v Poindexter*, 138 Mich App 322, 325–31 (1984) (purpose of MCL 712A.23; MSA 27.3178(598.23), which limits the use of records of delinquency adjudications in subsequent court proceedings, “is to hide youthful errors from the full glare of the public by preventing a juvenile court conviction from subsequently discrediting the individual due to childhood actions”). However, the court may be required by statute and court rule to maintain a permanent record of the case even though the case was placed on the consent calendar.\*

Cases placed on the consent calendar are treated in a summary fashion. The Court of Appeals has summarized the use of the consent calendar as follows:

“Generally, the purpose of formal juvenile proceedings is to determine whether the juvenile comes within the jurisdiction of the probate court. *In re Alton*, 203 Mich App 405, 408; 513 NW2d 162 (1994); see also MCR 5.903(A)(19). MCR 5.932(B) merely provides a means by which the juvenile and the parents may consent to the jurisdiction of the probate court. Pursuant to the

rule, the parties waive formal notice requirements. The probate court may then order any disposition provided for in MCL 712A.18; MSA 27.3178(598.18), except that it may not remove the juvenile from parental custody. If . . . the probate court finds that the juvenile has committed a violation of the Vehicle Code, the probate court must forward a copy of the record of the juvenile proceedings to the Secretary of State for recordation. MCR 5.932(B)(2); MCL 712A.2b(d); MSA 27.3178(598.2b)(d), MCL 257.732; MSA 9.2432.” *In re Neubeck*, 223 Mich App 568, 571–72 (1997).

## **1.4 Summary of Required Procedures for Cases on the Consent Calendar**

### **A. Filing and Authorization of Petition, or Receipt of Citation or Appearance Ticket**

MCR 5.932(B) allows the court to place a case on the consent calendar upon “authorizing the filing of a petition or on receipt of a citation or appearance ticket.” The court may authorize the filing of a petition following a preliminary inquiry pursuant to MCR 5.932(A)(4) or a preliminary hearing pursuant to MCR 5.935(B)(3). See also MCR 5.903(A)(15) (authorization of the filing of the petition requires written permission by referee or judge). This differs from diversion, which does not allow for the filing or authorization of a petition. See MCL 722.823(1); MSA 25.243(53)(1), MCR 5.932(A)(2), and MCR 5.935(B)(3).

When a criminal offense is alleged, including a criminal traffic offense, the prosecuting attorney must submit a petition. MCL 712A.11(2); MSA 27.3178(598.11)(2), and MCR 5.914(B)(1). The court rules qualify this requirement by allowing for submission of a citation or appearance ticket in certain cases. MCR 5.931(C) states, in part:

“A citation or appearance ticket which conforms to the requirements for valid issuance to an adult may serve as a petition as to an offense other than a major offense when presented to the court.”

A “major offense” means a felony. MCR 5.903(B)(3). Thus, proceedings concerning a misdemeanor traffic offense may be initiated by summons or appearance ticket.

## B. No Formal Notice Is Required

In cases on the formal calendar, the juvenile and parent must be personally served with a summons prior to trial. See MCL 712A.13; MSA 27.3178(598.13), and MCR 5.920(B)(2)(a)–(b). No formal notice is required for cases on the consent calendar, however. MCR 5.932(B)(1).

## C. Requirements for Establishing Jurisdiction

The juvenile and parent must both consent to the jurisdiction of the court. MCR 5.932(B). The court must find that a juvenile committed an offense before it takes jurisdiction over the juvenile. See *In re Alton*, 203 Mich App 405, 408 (1994). The court rule on the consent calendar does not specify the procedure to be used to establish that the juvenile committed the alleged offense. MCR 5.932(B)(2) states that “[i]f, after hearing, the court finds the accusation is true,” it may enter an order of disposition. However, many courts require the juvenile to enter a plea of admission before placing the case on the consent calendar. See, for example, *In re Neubeck*, 223 Mich App 568 (1997). For the procedural requirements for accepting a plea, see MCR 5.941.

There is no right to have a judge conduct the plea proceeding. MCR 5.912(A) limits the right to have a judge preside to hearings on the formal calendar.

## D. Available Dispositions

MCR 5.932(B)(2) provides that if the court finds the accusation to be true after a hearing, it may enter a dispositional order pursuant to MCL 712A.18; MSA 27.3178(598.18). However, MCR 5.932(B)(2) prohibits the court from placing the child outside of the home. Thus, the following dispositional options are available to the court:\*

\*See Section 1.12(B) for examples of forms used in conjunction with a “teen court” program. This program allows a jury of a juvenile’s peers to impose disposition in cases placed on the consent calendar.

## **F Warning to Juvenile and Dismissal of Petition**

The court may warn the juvenile or the juvenile's parents, guardian, or custodian and dismiss the petition. MCL 712A.18(1)(a); MSA 27.3178(598.18)(1)(a). If the court dismisses the petition after "adjudicating" a criminal traffic offense, the court may be required to permanently maintain its record of the proceedings.\*

\*See Section 1.6, below, for a detailed discussion of this issue.

## **F In-Home Probation**

The court may place the juvenile on probation, or under supervision in the juvenile's own home or in the home of an adult who is related to the juvenile. The court shall order the terms and conditions of probation or supervision, including reasonable rules for the conduct of the parents, guardian, or custodian, if any, as the court deems necessary for the physical, mental, or moral well-being and behavior of the juvenile. MCL 712A.18(1)(b); MSA 27.3178(598.18)(1)(b).

## **F Orders for Health Care**

The court may provide the juvenile with medical, dental, surgical, or other health care, in a local hospital if available, or elsewhere, maintaining as much as possible a local physician-patient relationship, and with clothing and other incidental items as the court considers necessary. MCL 712A.18(1)(f); MSA 27.3178(598.18)(1)(f).

## **F Orders to Parents to Refrain From Conduct Harmful to Juvenile**

The court may order the parents, guardian, custodian, or any other person to refrain from continuing conduct that the court determines has caused or tended to cause the juvenile to come within or to remain under the court's jurisdiction, or that obstructs placement or commitment of the juvenile pursuant to a dispositional order. MCL 712A.18(1)(g); MSA 27.3178(598.18)(1)(g).

An order directed to a parent or other person shall not be binding unless the parent has been given an opportunity for a hearing pursuant to the issuance of a summons or notice as provided in §§12 and 13 of the Juvenile Code. A certified copy of the order must be personally served on the parent or other person. MCL 712A.18(4); MSA 27.3178(598.18)(4).

## **F Order for Community Service**

The court may order the juvenile to engage in community service. MCL 712A.18(1)(i); MSA 27.3178(598.18)(1)(i).

## **F Order to Pay a Civil Fine**

If the court finds that the juvenile has violated a municipal ordinance or a state or federal law, the court may order the juvenile to pay a civil fine in the amount of the civil or penal fine provided by the ordinance or law. MCL 712A.18(1)(j); MSA 27.3178(598.18)(1)(j).

## **F Order for Court Costs**

The court may order the juvenile to pay court costs. MCL 712A.18(1)(k); MSA 27.3178(598.18)(1)(k).

## **F Order to Parents to Participate in Treatment**

The court may order the juvenile's parent or guardian to personally participate in treatment reasonably available in the parent's or guardian's location. MCL 712A.18(1)(l); MSA 27.3178(598.18)(1)(l).

An order directed to a parent or other person shall not be binding unless the parent has been given an opportunity for a hearing pursuant to the issuance of a summons or notice as provided in §§12 and 13 of the Juvenile Code. A certified copy of the order must be personally served on the parent or other person. MCL 712A.18(4); MSA 27.3178(598.18)(12).

## **F Reimbursement of Costs of Service, Restitution, and Victim's Rights Fee**

The court may also order the juvenile or the juvenile's parent to reimburse the court for the costs of service, MCL 712A.18(3); MSA 27.3178(598.18)(3), or pay restitution to any victim of the juvenile's offense, MCL 712A.18(7); MSA 27.3178(598.18)(7). For certain offenses, the court must order the juvenile to pay an assessment under the crime Victim Rights Act. MCL 712A.18(12); MSA 27.3178(598.18)(3).

## **E. Sending Abstract of Record to Secretary of State**

\*See Section 1.8, below, for a more detailed discussion of "abstracting" requirements.

MCL 257.732(1)(a); MSA 9.2432(1)(a), requires the court, within 14 days after entry of an order of disposition, to forward an abstract of the court record to the Secretary of State if the juvenile is found within the jurisdiction of the Family Division for violating the Michigan Vehicle Code or a local ordinance substantially corresponding to a provision of the Michigan Vehicle Code.\*

## **F. Failure to Appear or to Fulfill Conditions of Probation**

The juvenile's failure to appear or violation of a probation condition may result in transfer of the case from the consent to the formal calendar. MCR 5.932(B)(3).

There may be additional sanctions. MCR 5.931(D) states that "[i]f the juvenile is a Michigan resident and fails to appear or otherwise to respond to any matter pending relative to a motor vehicle violation," the court must initiate the procedures under MCL 257.321a; MSA 9.2021(1), for suspension of the juvenile's driver's license. The court may also issue an order to take the juvenile into custody.



## 1.5 Summary of Required Procedures for Diversion

Courts may utilize diversion procedures in conjunction with cases placed on the “consent docket.”\* Juveniles accused of traffic violations may be diverted from formal court procedures. See MCL 722.823(3); MSA 25.243(53)(3), and MCL 722.822(a); MSA 25.243(52)(a) (minors who commit certain assaultive offenses may not be diverted). “Diversion” is defined as the placement that occurs when a formally recorded apprehension is made by a law enforcement agency for an act by a minor which, if a petition were filed with the court, would bring the minor within the formal jurisdiction of the court under MCL 712A.2(a); MSA 27.3178(598.2)(a). MCL 722.822(c); MSA 25.243(52). Instead of a petition being filed or authorized, however, either of the following occurs:

“(i) the minor is released into the custody of his or her parent, guardian, or custodian and the investigation is discontinued, or

“(ii) the minor and the minor’s parent, guardian, or custodian agree to work with a person or public or private organization or agency that will assist the minor and the minor’s family in resolving the problem that initiated the investigation.” MCL 722.822(c)(i)–(ii); MSA 25.243(52)(c)(i)–(ii), and MCL 722.823(1)(a)–(b); MSA 25.243(53)(1)(a)–(b).

The Juvenile Diversion Act may be used by law enforcement officials and court intake workers prior to the filing of a petition or before the court authorizes a petition. MCL 722.823(1); MSA 25.243(53)(1), MCR 5.932(A)(2), and MCR 5.935(B)(3). However, once a petition is authorized, the act may no longer be used.

### A. Diversion Conference

If the decision is made to divert the minor with a referral to a person or private or public organization or agency, a conference must first be held with the minor and the minor’s parent, guardian, or custodian to consider alternatives to the filing of a petition with the court or to the authorization of a petition. MCL 722.825(1); MSA 25.243(55)(1).

### B. Diversion Agreement

If a diversion agreement is reached that imposes conditions on the minor, the terms of the agreement must be set forth in writing, dated, and signed by the law enforcement official or court intake worker, the minor, and the minor’s parent, guardian, or custodian. MCL 722.825(3); MSA 25.243(55)(3). Note that in cases where the “consent calendar” is used, courts often use a “consent agreement,” which may be similar in its terms to a “diversion agreement.”

If a conference is held but an agreement is not reached, a petition may be filed with the court as provided by law and a petition may be authorized as

\*See the sample forms contained in Section 1.12(C).

provided by law. If the law enforcement official or court intake worker decides to file a petition, it must be filed no later than 30 days after the conference. MCL 722.825(4); MSA 25.243(55)(4).

### C. Revocation of Diversion Agreement

If the minor complies with the terms of the diversion agreement and the referral plan, a petition cannot be filed with the court, or if a petition has been filed, the petition cannot be authorized by the court. MCL 722.825(1)(d); MSA 25.243(55)(1)(d).

However, “[i]f the minor fails to comply with the terms of the diversion agreement and the referral plan, the law enforcement official or court intake worker may revoke the diversion agreement. If the diversion agreement is revoked, a petition may be filed with the court as provided by law and a petition may be authorized by the court as provided by law.” MCL 722.825(5); MSA 25.243(55)(5).

## 1.6 Retention or Expungement of “Juvenile Court” Records

“Records” are defined in MCR 5.903(A)(9) as “the pleadings, motions, authorized petition, notices, memoranda, briefs, exhibits, available transcripts, findings of the court, and court orders.” See also AO 1985-5, as amended by 1988-3, Part II, 430 Mich xcix (1988) (contents and purposes of juvenile court case records).

Under MCR 5.925(B), the court may make and preserve a record of hearings on the consent calendar “by a written memorandum executed by the judge or referee setting forth findings and procedures followed.”

The Family Division must keep diversion information in a separate confidential record. MCL 722.827; MSA 25.243(57). This record is open to law enforcement agencies and court intake workers and, by order of the court, to persons having a legitimate interest, but only for the purpose of deciding whether to divert a minor. MCL 722.828(1)–(2), 722.829(1); MSA 25.243(58)(1)–(2), 25.243(59)(1). These records must be destroyed within 28 days after the minor becomes 17 years of age. MCL 722.828(3); MSA 25.243(58)(3), and MCR 5.925(E)(2)(b). If the case is diverted and the juvenile complies with the diversion agreement, no adjudication occurs. Because no adjudication occurs, no report of a traffic offense need be made to the Secretary of State.

The rules governing retention or expungement of “juvenile court” records are contained in MCR 5.925(E). That rule states, in pertinent part:

“(1) **Definitions.** When used in this subrule, unless the context otherwise indicates:

“(a) ‘expunge’ means to obliterate or destroy;

....

**“(2) Court Files and Records.**

“(a) **General.** The court may at any time for good cause expunge its own files and records pertaining to an offense by . . . a minor other than an adjudicated offense described in subrule (E)(3)(a) . . . .

“(b) **Delinquency Files and Records.** . . . The court must expunge the files and records pertaining to a person’s juvenile offenses, other than any adjudicated offense described in subrule (E)(3)(a) . . . , when the person becomes 30 years of age.

**“(3) Setting Aside Adjudications.\***

“(a) . . . **Criminal Traffic Violations.** The court may not set aside an adjudication of . . . an offense which if committed by an adult would be a criminal traffic violation.”

This court rule explicitly requires that the court permanently maintain a record of “adjudicated” criminal traffic violations committed by a juvenile. A subsection of the Michigan Vehicle Code, MCL 257.732(20); MSA 9.2432(20), adds that “notwithstanding any other provision of law, a court shall not order expunction of any *violation reportable to the secretary of state* under [MCL 257.732; MSA 9.2432]” (emphasis added). MCL 257.732; MSA 9.2432, requires the court to send an abstract of the court record to the Secretary of State following an adjudication or disposition of a criminal violation of the Michigan Vehicle Code.

It is unclear whether cases are “adjudicated” when the court is proceeding informally on the consent calendar. The term “adjudication,” in the context of a case on the consent calendar, is ambiguous. Consider the following:

- F “Adjudication” is not explicitly defined in MCR 5.903, the section of Subchapter 5.900 containing the definitions applicable to juvenile proceedings. MCR 5.903(A)(19) defines a “trial” as “the fact-finding *adjudication* of a case on the *formal calendar* . . . to determine if the minor comes within the jurisdiction of the court” (emphasis added). This definition seems to limit application of the rule prohibiting expungement of adjudicated criminal traffic offenses to those adjudicated on the formal calendar.

\*Setting aside a criminal conviction or juvenile adjudication differs in procedure from expungement of records, but the effect is similar. MCL 712A.18e (2)(b); MSA 27.3178 (598.18e) (2)(b), and MCR 5.925(E)(3)(a) prohibit setting aside juvenile adjudications of criminal traffic violations.

\*See, for example, the sample court policy contained in Section 1.12(A).

- F When proceeding on the consent calendar, the court must hold a hearing to determine if “the accusation is true.” MCR 5.932(B)(2). Although in cases on the formal calendar the court takes jurisdiction over the juvenile following an adjudication by trial or plea, it is unclear whether a court’s finding that “the accusation is true” is equivalent to an adjudication. Note, however, that some courts conduct a plea proceeding for cases on the consent calendar.\*
- F Before proceeding on the consent calendar, the juvenile and parent must consent to the jurisdiction of the court. MCR 5.932(B). MCL 712A.18(1); MSA 27.3178(598.18)(1), and MCR 5.943(A) require that the court find that the juvenile comes within the jurisdiction of the court before entering a dispositional order. Although in cases on the formal calendar the court takes jurisdiction over the juvenile following an adjudication by trial or plea, it is unclear whether the juvenile’s and parent’s consent to the court’s jurisdiction is equivalent to an adjudication.
- F Under the Michigan Vehicle Code, a “conviction” includes a juvenile court adjudication or disposition for a criminal traffic violation, and a “conviction” occurs “regardless of whether the penalty is rebated or suspended.” MCL 257.8a; MSA 9.1808(1). This section provides that actual imposition of a penalty does not affect the determination of whether an “adjudication” has occurred.
- F In cases placed on the consent calendar, if the juvenile fails to appear or violates a condition of disposition, the court may transfer the case to the formal calendar. The court may then conduct formal delinquency proceedings based on the same charge, and the juvenile is entitled to a jury trial on the charge. MCR 5.932(B)(3). This court rule also limits the use of the juvenile’s statements made while the case was on the consent calendar “at a trial on the formal calendar based upon the same charge.” If cases on the consent calendar were formally adjudicated, the provision in MCR 5.932(B)(3) for adjudication by trial following transfer of the case to the formal calendar would be redundant.
- F A court may utilize the procedures outlined in the Juvenile Diversion Act in conjunction with the consent calendar. If the Juvenile Diversion Act is utilized, no petition is authorized for filing and the court does not adjudicate the offense.

If the court does not adjudicate the offense or enter a dispositional order under §18 of the Juvenile Code, it is not required to maintain a permanent record of a criminal traffic violation committed by the juvenile.

## 1.7 Prior Court Rules Governing Expungement of Consent Calendar and Traffic Violation Records

Previous court rules expressly provided for the expungement of records following successful completion of consent probation. JCR 1969, 4.3(C) provided that if “further court action” was not required, the court could “order all records relating to matters on the consent calendar expunged.” When the Michigan Court Rules were adopted in 1985, MCR

5.904(C)(3)(d) governed expungement of court records of cases placed on the consent calendar, and that rule contained the same language as in JCR 1969, 4.3(C).

JCR 1969, 13 was the general rule relating to expungement of delinquency records. That rule, and its successor, MCR 5.913, the court rule that immediately preceded the current MCR 5.925(E), provided for retention of a juvenile's "motor vehicle violation citations and summonses" until age 19, when they were required to be expunged. In addition, the previous court rule allowed the "juvenile court" to order expungement of law enforcement agency files and records. In 1988, the current MCR 5.925(E) replaced MCR 5.913.

Expungement of records of all delinquency cases, including consent calendar cases, is now governed by MCR 5.925. See 5 Martin, Dean & Webster, Michigan Court Rules Practice (3d ed), p 666.

## 1.8 Abstracting Requirements

If the court enters an order adjudicating the juvenile for a violation of the Michigan Vehicle Code, MCL 257.1 et seq.; MSA 9.1801 et seq., the court must fulfill the reporting requirements imposed by MCL 257.732; MSA 9.2432.

MCL 257.732(1)(a); MSA 9.2432(1)(a), requires the court, within 14 days after entry of an order of disposition, to forward an abstract of the court record to the Secretary of State if the juvenile is found within the jurisdiction of the Family Division for violating the Michigan Vehicle Code or a local ordinance substantially corresponding to a provision of the Michigan Vehicle Code.

MCL 257.732(4); MSA 9.2432(4), requires the clerk to forward an abstract of the court record upon a person's conviction of any of the following offenses or attempt to commit any of the following offenses:

- F unlawful driving away a motor vehicle, MCL 750.413; MSA 28.645;
- F unlawful use of an automobile, without intent to steal, MCL 750.414; MSA 28.646;
- F failure to obey a police or conservation officer's direction to stop, MCL 750.479a; MSA 28.747(1);
- F felonious driving, MCL 752.191; MSA 28.661;
- F negligent homicide with a motor vehicle, MCL 750.324; MSA 28.556;
- F manslaughter with a motor vehicle, MCL 750.321; MSA 28.553;
- F murder with a motor vehicle, MCL 750.316; MSA 28.548 (first-degree murder), and MCL 750.317; MSA 28.549 (second-degree murder);
- F minor purchasing or attempting to purchase, consuming or attempting to consume, or possessing or attempting to possess alcoholic liquor, MCL

436.1703; MSA \_\_. \_\_, or a local ordinance substantially corresponding to this section; or

- F a controlled substance offense listed in MCL 333.7401–333.7461; MSA 14.15(7401)–14.15(7461), or MCL 333.17766a; MSA 14.15(17766a).

A “conviction” includes a juvenile court adjudication or disposition. See MCL 257.8a; MSA 9.1808(1).

MCL 257.732(8); MSA 9.2432(8), requires the clerk of the Family Division to forward an abstract of the court record to the Secretary of State where the offense for which the disposition is ordered is a “felony in which a motor vehicle was used.” “Felony in which a motor vehicle was used” is defined as a felony during which the juvenile operated a motor vehicle, and while operating the vehicle presented real or potential harm to persons or property, and one or more of the following circumstances existed:

“(a) The vehicle was used as an instrument of the felony.

“(b) The vehicle was used to transport a victim of the felony.

“(c) The vehicle was used to flee the scene of the felony.

“(d) The vehicle was necessary for the commission of the felony.” MCL 257.732(5)(a)–(d); MSA 9.2432(5)(a)–(d).

However, under MCL 257.732(6); MSA 9.2432(6), the following felonies or attempts to commit these felonies are *excluded* from the definition of “felony in which a motor vehicle was used”:

- F taking possession of and driving away a motor vehicle, MCL 750.413; MSA 28.645;
- F use of a motor vehicle without authority but without intent to steal, MCL 750.414; MSA 28.646;
- F failure to obey a police or conservation officer’s direction to stop, MCL 750.479a(2) or (3); MSA 28.747(1)(2) or (3), and MCL 257.602a(2) or (3); MSA 9.2302(1)(2) or (3);
- F felonious driving, MCL 752.191; MSA 28.661;
- F negligent homicide with a motor vehicle, MCL 750.324; MSA 28.556;
- F manslaughter with a motor vehicle, MCL 750.321; MSA 28.553;
- F murder with a motor vehicle, MCL 750.316; MSA 28.548 (first-degree murder), and MCL 750.317; MSA 28.549 (second-degree murder);
- F minor in possession, MCL 436.1703; MSA \_\_. \_\_;
- F fraudulently altering or forging documents pertaining to motor vehicles, MCL 257.257; MSA 9.1957;
- F perjury or false certification to Secretary of State, MCL 257.903; MSA 9.2603;
- F malicious destruction of trees, grass, shrubs, etc., with a motor vehicle, MCL 750.382(1)(c) or (d); MSA 28.614(1)(c) or (d);

- F failing to stop and disclose identity at the scene of an accident resulting in death or serious injury, MCL 257.617; MSA 9.2317; and
- F certain “drunk driving” offenses.

See MCL 257.732(4); MSA 9.2432(4), and MCL 257.319; MSA 9.2019, for the statutory sections that list these offenses. Also excluded is a controlled substance violation under MCL 333.7401–333.7461, or 333.17766a; MSA 14.15(7401)–14.15(7461), or 14.15(17766a), for which the defendant receives a minimum sentence of less than one year.

These offenses are excluded from the notice requirement of MCL 257.732(6); MSA 9.2432(6), because the penalties for all of these listed offenses already require mandatory license suspension upon conviction.

The abstract must be certified by signature, stamp, or facsimile signature to be true and correct, and it must contain the following information:

“(a) The name, address, and date of birth of the person charged or cited.

“(b) The number of the person’s operator’s or chauffeur’s license, if any.

“(c) The date and nature of the violation.

“(d) The type of vehicle driven at the time of the violation . . . .

“(e) The date of the conviction, finding, forfeiture, judgment, or civil infraction determination.

“(f) Whether bail was forfeited;

“(g) Any license restriction, suspension, or denial ordered by the court as provided by law.

“(h) The vehicle identification number and registration plate number of all vehicles that are ordered immobilized or forfeited.

“(i) Other information considered necessary to the Secretary of State.”  
MCL 257.732(3)(a)–(i); MSA 9.2432(3)(a)–(i).

## 1.9 Table 1: Comparison of Consent Calendar and Diversion Procedures

The procedures for use of the consent calendar and those for diversion of a juvenile from court are similar, and diversion may be used for cases placed on the “consent docket.” However, it is important to note the differences between cases that have been diverted and those that have been *adjudicated* on the consent calendar, as important consequences flow from the differences between these procedural mechanisms. The following chart illustrates those differences.

	<b>Filing Require- ments</b>	<b>Adjudication</b>	<b>Disposition</b>	<b>Abstracting &amp; Record Retention</b>
<b>Diversion</b>	The Juvenile Diversion Act specifies that it may not be used if a petition has been authorized by the court. Minor may be referred to a public or private agency.	None. The minor is diverted from court jurisdiction.	No dispositional order is entered. Juvenile and parent, guardian, or custodian must voluntarily accept services.	No abstract is sent to the Secretary of State. Diversion information is confidential and must be destroyed within 28 days after the juvenile's 17th birthday.
<b>Consent Calendar</b>	The court may authorize the filing of a petition or, in an appropriate case, receive a citation.	The court must determine that the accusation is true. Before entering an order of disposition, the court must find that the juvenile comes within its jurisdiction.	The court may enter an order of disposition under §18 of the Juvenile Code, but the juvenile may not be removed from parental custody.	If the court adjudicates the offense or enters an order of disposition, the court must send an abstract of its record to the Secretary of State. Court records of adjudicated criminal traffic violations must not be expunged or set aside.

### 1.10 Use of the "Consent Calendar" and Court Records: *In re Neubeck*

In *In re Neubeck*, 223 Mich App 568 (1997), the Court of Appeals addressed the interplay between the use of the consent calendar and the expungement of "juvenile court" records in cases involving criminal traffic violations. In *Neubeck*, the juvenile respondent plead guilty to operating a motor vehicle while visibly impaired, MCL 257.625(3); MSA 9.2325(3), and another offense. Respondent filed a motion requesting that the court place the case on the consent calendar, but the prosecuting attorney objected. The prosecuting attorney argued that cases involving alleged violations of the Michigan Vehicle Code could not be placed on the consent calendar because it would conflict with MCR 5.925(E)(2)(b), which prohibits the expungement of "juvenile court" records of adjudicated criminal traffic offenses. The trial court disagreed. *Id.*, at 569–70.



On appeal, the Court of Appeals first rejected the prosecuting attorney's assertion that cases involving criminal traffic violations must not be *placed* on the consent calendar because of a conflict with the rule prohibiting expungement of court records of adjudicated criminal traffic violations. In support of its conclusion, the Court of Appeals noted that the trial court must comply with reporting or "abstracting" requirements under the Michigan Vehicle Code in cases placed on the consent calendar. Thus, it is clear that the consent calendar was intended for use when a vehicle code violation was alleged. *Id.*, at 572–73.

The Court then addressed the prosecuting attorney's assertion that the trial court intended to expunge the juvenile respondent's record upon his successful completion of probation or after he turned 18 years of age. Because the prosecuting attorney failed to provide evidence that the trial court actually expunged the respondent's record, the Court of Appeals concluded that the issue was not ripe for review. *Id.*, at 573. The Court added:

"Additionally, petitioner submits to this Court a juvenile consent agreement it alleges that the Oakland County Probate Court uses. The sample agreement provides: 'After a successful Consent probation period, the records may be destroyed after the juvenile's 18th birthday. However, if new charges are found to be true, the Consent records will not be destroyed until the person's 30th birthday.' First, there is no indication that respondent signed this agreement when he consented to the probate court's jurisdiction, because this agreement does not appear in his file. Second, this agreement does not purport to contradict the terms of MCR 5.925(E)(2)(a) in relation to the general prohibition against expungement of records of juvenile traffic violation adjudications. Third, although petitioner argues that the Oakland County Probate Court has a general policy of expunging records of juvenile traffic violations placed on its consent calendar, there is simply no evidentiary support for this assertion. Even if it were true, it is unfair to require respondent to defend the practice of the probate court where there is no indication that he actually received, or will receive, the benefit of such a policy. If petitioner seeks to challenge the generalized practice of the Oakland County Probate Court, it should bring an action for superintending control against the appropriate parties." *Id.*, at 573–74.

The Court of Appeals remanded the case to the trial court so that respondent's violation could be reported to the Secretary of State if the trial court had not already done so. *Id.*, at 574–75.

\*For discussion of the issues that the Court in *Neubeck* did not address, see Sections 1.3 and 1.6.

As stated above, the Court of Appeals in *Neubeck* concluded that cases involving criminal traffic violations could be placed on the consent calendar, and that if it enters an order of disposition in such a case, the court must report the violation to the Secretary of State. The Court did not address, however, the relationship between the use of the consent calendar and retention of court records of adjudicated criminal traffic violations. In particular, the Court did not address how variations in consent calendar procedure might affect the record retention requirement under MCR 5.925(E)(2)(a), nor how expungement of court records after successful completion of consent probation might best serve the “protective and supportive” functions of the consent calendar.\*

### 1.11 Access to “Juvenile Court” Records, Abstracts, and Police Records

In general, the purpose of rules limiting access to juvenile offense records “is to hide youthful errors from the full glare of the public by preventing a juvenile court conviction from subsequently discrediting the individual due to childhood actions.” *People v Poindexter*, 138 Mich App 322, 325–31 (1984). More importantly, the purpose of the “expungement” rules and statutes is to limit the social and economic stigma of a delinquency adjudication. *People v Smith*, 437 Mich 293, 302–03 (1991).

A juvenile and parent may ask the court to place the case on the consent calendar because the court agrees to expunge the record of the proceedings earlier than it would in cases placed on the formal calendar. However, if the court’s record may not be expunged, as is the case with adjudicated criminal traffic violations, the benefit of the consent calendar to the juvenile and parent is reduced. Members of the general public, including employers, may have access to the court’s records pursuant to the following rules.

MCL 712A.28; MSA 27.3178(598.28), and MCR 5.925(D) govern access to “juvenile court” records. Under MCL 712A.28(2); MSA 27.3178(598.28)(2), and MCR 5.925(D)(1), the general rule is that all records of the juvenile court, other than confidential files, are open to the general public when the proceedings are open to the public. All files created before June 1, 1988, are confidential. MCL 712A.28(1); MSA 27.3178(598.28)(1).

The Family Division must keep diversion information in a separate confidential record that is open to law enforcement agencies and court intake workers and, by order of the court, to persons having a legitimate interest, but only for the purpose of deciding whether to divert a minor. MCL 722.827; MSA 25.243(57), MCL 722.828(1)–(2); MSA 25.243(58)(1)–(2), and MCL 722.829(1); MSA 25.243(59)(1).

The purpose of the “abstracting” requirements is to maintain accurate driving records. If the court finds that a juvenile has violated the Michigan Vehicle Code, the court must forward an abstract of the court record of the case to the Secretary of State, as required by MCL 257.732; MSA 9.2432. The Secretary of State enters the abstract on the juvenile’s driving record,

and all abstracts are open for public inspection. MCL 257.732(14); MSA 9.2432(14).

Police records are not covered by MCL 712A.28; MSA 27.3178(598.28), the statute governing access to “juvenile court” records. Therefore, the public may have access to the “arrest record” of a juvenile retained by a law enforcement agency. *Aetna v Oakland Probate Judges*, 393 Mich 597, 599 (1975).

## 1.12 Sample Court Policies and Forms

The following sample court policies and forms are intended to illustrate the variety of procedures utilized by courts to treat cases placed on the consent calendar. In addition to illustrating the variety of approaches to the consent calendar in general, the sample policies and forms highlight how different procedures affect court record retention policies. As noted in Section 1.6, above, the ability of the court to expunge its record of a criminal traffic violation placed on the consent calendar depends upon whether the court “adjudicates” the offense. See also MCR 5.925(E)(2)(a) and (E)(3)(a).

The policy described in Section 1.12(A) requires the juvenile to plead “guilty” to the offense, and the plea proceeding is conducted pursuant to MCR 5.941. The court “adjudicates” the offense; therefore, under this policy, the court may not expunge its record of a criminal traffic violation.

The policy described in Section 1.12(B) allows the court to adjourn the proceedings at the preliminary hearing stage after an agreement is reached to place the case on the consent calendar. If the juvenile successfully fulfills the “probation” conditions imposed by a “jury” of his or her peers, the “complaint” is dismissed and no further court action is taken. Because no adjudication occurs, under this policy, the court may expunge its record of a criminal traffic violation.

The policy described in Section 1.12(C) requires that the child come within the provisions of the Juvenile Diversion Act before the case is placed on the consent calendar. The policy also requires only that the child admit involvement in the offense, not that he or she enter a formal plea of admission. No adjudication occurs under this policy, and the court may therefore expunge its record of a criminal traffic violation.

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